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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WINNFRED WRIGHT et al., Defendants and Appellants.	A102291, A102824 (Marin County Super. Ct. Nos. SC123202A, SC123202D)

In two consolidated appeals, Winnfred Wright and Mary Campbell appeal from final judgments of conviction following pleas of guilty to multiple counts of felony child abuse. (Pen. Code, § 273a, subd. (a).) We correct a clerical error in Campbell's abstract of judgment, and affirm the judgments in all other respects.

PROCEDURAL HISTORY

On February 8, 2002, the grand jury of Marin County returned an indictment charging Wright with the following felonies: count 1, murder of a child by the name of Ndigo (Pen. Code, § 187, subd. (a)); count 2, involuntary manslaughter of Ndigo (Pen. Code, § 192, subd. (b)); count 3, felony child abuse of Ndigo (Pen. Code, § 273a, subd. (a)), with an enhancement for circumstances likely to produce great bodily harm or death (Pen. Code, § 12022.95); counts 5 through 16, felony child abuse of 12 other specifically named children; and count 17, possession of an assault weapon. (Pen. Code, § 12280, subd. (b)).

The same grand jury indictment charged Campbell with three offenses involving the child Ndigo: murder (count 1), manslaughter (count 2), and felony child abuse with an enhancement for circumstances likely to produce great bodily harm or death (count 3). In addition, the indictment charged her with five additional counts of felony child abuse of other specifically named children (counts 12 through 16) and possession of an assault weapon (count 17).

On December 16, 2002, the District Attorney of Marin County filed an amended indictment against Wright that retained the murder, manslaughter and weapons charges but charged only six counts of felony child abuse (Pen. Code, § 273a, subd. (a)): count 3, felony child abuse of Ndigo with an enhancement for circumstances likely to produce great bodily harm or death (Pen. Code, § 12022.95); count 4, felony child abuse of Nyala, Rashida, and Jaronimo; count 5, felony child abuse of Lemurian, Dnagual, Iternity, Kasha, Valositti, and Kaia; count 6, felony child abuse of Starchild; count 7, felony child abuse of Chikung; and count 8, felony child abuse of Sirius. Subsequently, Wright pled guilty to the six counts of felony child abuse and the district attorney dismissed the other charges pursuant to a negotiated disposition.[1]

On the same date, the district attorney filed an amended indictment against Campbell that similarly reduced the number of counts of felony child abuse: count 3, felony child abuse of Ndigo with an enhancement for circumstances likely to produce great bodily harm or death; count 4, felony child abuse of Iternity, Kasha, and Valositti; count 5, felony child abuse of Chikung; and count 6, felony child abuse of Kaia. Campbell then pled guilty to the four counts of felony child abuse and the district attorney dismissed the other charges.

Both Wright and Campbell stipulated that the court could consider the transcript of the grand jury proceeding in determining a factual basis for their pleas of guilty. Prior to

[1] We are aware of the California Supreme Court policy requesting nondisclosure of minors' names in appellate court proceedings. However, due to the uncommon first names, the same initials shared by six of the minors, and the large number of dependents, we were unable to write an opinion addressing the issues as to each child without making it nearly unreadable. (Cal. Style Manual (4th ed. 2000) § 5.9, pp. 179-180.)

the sentencing hearing, the district attorney filed two sentencing statements approximately 100 pages in length that drew extensively from this source of information. When the sentencing of the two defendants came up for hearing on March 14, 2003, the court sentenced Wright to a term of 16 years and 8 months in state prison, consisting of an upper term of 6 years for felony child abuse (Pen. Code, § 273a, subd. (a), an enhancement of 4 years for circumstances likely to produce great bodily injury or death (Pen. Code, § 12022.95), and one-third of five consecutive terms of felony child abuse. The court sentenced Campbell to a term of 10 years in state prison consisting of a lower term of 2 years for felony child abuse, an enhancement of 4 years for circumstances likely to produce great bodily injury or death, and three consecutive terms of 16 months.

Both defendants filed notices of appeal based on the sentences imposed.

STATEMENT OF FACTS

The child abuse came to the attention of authorities when four women arrived at the emergency room of Kaiser Hospital in San Rafael, California, at 10:30 p.m. on November 13, 2001, and presented the grossly deformed body of a 19-month-old boy, Ndigo, to Dr. Thomas Meyer, the physician on duty. Dr. Meyer noted that the women showed no apparent emotion. One of the women explained calmly, "Our child is not breathing." Dr. Meyer soon determined that the child was dead. In his opinion, the child had probably been dead for one or two hours.

Upon being notified of the incident, several deputy sheriffs arrived at the hospital and separately interviewed the women, who included the defendant Campbell and three codefendants not involved in the present appeal. Within a day, an investigation revealed that the women lived with one man, the defendant Wright, and 12 surviving children in a household that maintained a regimen of life involving a vegan diet and complete isolation of the children in the interior of the house. Their residence at 35 Mt. Muir Court in San Rafael contained four bedrooms and common areas consisting of a foyer, family room, and living room, as well as kitchen, bathroom, and laundry areas. All the windows were covered with sheets or closed blinds. When the sheriff's deputies visited the home in the

early morning hours of November 14, 2001, they encountered the defendant Wright outside the home and found 12 children inside.

Wright, then age 44, described himself as "spiritually renounced." He explained, "I reached a point where I don't belong in societal norms." The household was managed by his four wives, who discharged different functions in the house, so that he could "use [his] energy to transform into a more spiritual relationship with everyone." Three of the wives, including Campbell, age 37, worked outside the home during the day. Wright was the father of Ndigo and all 12 children found in the house. Campbell was the mother of the six children identified in the amended indictment—the deceased child, Ndigo, and surviving children Iternity, Kasha, Valositti, Chikung, and Kaia.

In the grand jury proceedings, the emergency room physician and a coroner's investigator presented testimony about the condition of the deceased child, which was consistent with the autopsy later conducted by Dr. Gregory Reiber. We will review here only Dr. Reiber's testimony. His primary finding was that the child suffered from the effects of vitamin D deficiency, commonly known as rickets, caused by the combination of a vegan diet and extreme isolation from sunlight.

Dr. Reiber found the child to be extremely small and underdeveloped. At 18 months, Ndigo was the length and weight of an infant five to six months old. The heart, liver and other internal organs were correspondingly underdeveloped. Symptomatic of caloric malnutrition, the body was almost entirely lacking in subcutaneous fat and the buttocks were flat with flaccid skin. The stomach was distended in a manner characteristic of malnutrition and other parts of the body displayed edemas caused by excess fluids accumulating in the tissues.

The bone structure, in Dr. Reiber's words, exhibited "severe profound demineralization of the bone." He explained, "from the standpoint of mineral content in the bone, the fact that the bones hardly show up on X-ray distinguishable from the soft tissue around them is extremely severe in this case." As a consequence, the bones were soft and pliable; the teeth were poorly anchored to the jaw; the upper extremities "were obviously malformed on both sides with abnormal curvatures in the arms and forearms."

Due to their demineralized condition, the bones did not show up well on X-rays, but Dr. Reiber found evidence of fractured bones with varying degrees of healing in multiple locations—both upper arms, a clavicle, the skull and several ribs. He observed that these fractures would have been extremely painful to the child. The body showed a severe muscular underdevelopment that accompanies an inadequate bone structure. Though bowed, the legs displayed no signs of fractures and less severe abnormalities than other bone structures, suggesting that they had never been used.

The most remarkable finding was that the lungs were extremely small and underdeveloped. They were in fact of a size normal for a two- to three-month-old infant. The small size of the lungs reflected the correspondingly small and concave structure of the rib cage, which did not allow the lungs room to grow. Moreover, the sagging rib structure failed to support the chest wall in a normal shape and could be expected to impede normal breathing. Dr. Reiber concluded that the child "would be under-powered in his respiratory system. . . . So this would be a child who would have a very difficult time maintaining himself as far as his breathing and his oxygen supply to his tissues."

Dr. Reiber found that the child suffered from "very severe rickets," with secondary problems of pulmonary underdevelopment and caloric malnutrition. He attributed the child's death to "respiratory failure" caused by arrested development of the lungs resulting from "chest wall maldevelopment due to severe nutritional rickets." A contributing cause of death were the effects of very severe malnutrition.

The morning after Ndigo's death, the 12 surviving children were removed from their residence and placed in the custody of Child Protective Services. Within a week they were examined by Dr. Robert Pantell, Chief of the Division of General Pediatrics at the University of California, San Francisco. The public health nurse assigned to the case, Pamela Doerr, saw the children at least weekly at her office and made repeated visits to the foster homes where they were placed. In addition, law enforcement officers conducted interviews of the children old enough to speak. Both Dr. Pantell and Doerr testified before the grand jury, and the district attorney summarized certain findings of

the officers' interviews in the People's Sentencing Statement. These sources allow us to draw the following individual profiles of the children.

The youngest child, Dnagual, was unable to crawl and experienced difficulty in sitting up at 8 months of age. This muscle weakness, Dr. Pantell explained, was characteristic of children with rickets. His X-rays revealed a "marked demineralization of the bone" with abnormalities in the rib cage and wrists. Blood tests showed not only extremely low vitamin D levels but also deficiencies in other nutrients including zinc, vitamin E and folic acid. Dr. Pantell described him as something of "a time bomb because he really would not be able to stand on bones that demineralized." He would "expect some of the consequences that you would see in some of the other children if Dnagual tried to stand. In other words, there really is a very, very poorly structured bone in Dnagual."

Three of the other children displayed gross and conspicuously visible abnormalities caused by vitamin D deprivation. The most gravely affected, Sirius, age 2, was incapable of sitting up or bearing his own weight. He experienced constant physical distress causing him to whimper in pain while making simple movements or while being held or propped up. The public health nurse, Pamela Doerr, described him as being "a very, very tiny two-year-old who looks more like maybe a 14-month-old in size." X-rays revealed a highly demineralized bone structure, which manifested itself in bowed legs, spinal curvature, protruding ribs, a flaring of bone structure in wrists, and poor dentition. His only form of mobility was bizarre activity described as "headwalking." Lacking the bone and muscle strength to support his head, he would push it around the floor like a wheelbarrow with his bottom in the air. Dr. Pantell testified that he had never observed such behavior and noted that most two-year-olds "are generally running nonstop." But in Dr. Pantell's opinion, his most dangerous symptom was a low calcium level in the blood that could lead to "seizures and other serious problems." Dr. Pantell believed both Dnagual and Sirius suffered from a potentially life-threatening condition, but Sirius was most at risk.

Chikung, age 4, as described by Dr. Pantell, had "an abnormally short stature" and displayed "obvious" bowing of the legs, curved spine, deformed clavicles, and "splayed out arms." He walked with "a definite abnormal gait" and was missing upper and lower front teeth. The nurse, Pamela Doerr, found that he experienced pain when she asked him to stand on one leg or to hop. Even after growing half an inch, she placed him in the lower third percentile in height. Dr. Pantell testified that he would "certainly require surgery" to straighten his bone structure.

Starchild, age 5, was a small, thin child who placed in the lower 10 percentile in height, though he was difficult to measure due to his bowed legs. Doerr described him as "extremely deformed . . . he appears to be quite knock-kneed and flat-footed so that his feet pronate inward. He held his hands at odd angles. That was visibly noticeable. It was very curious, his posture. He has a very unusual gait because of his deformities. He's walking and trying to run, but it's very lopsided and awkward." Dr. Pantell drew attention to protrusions at the ends of bones in the ribs and wrists, and "malformed" clavicles. He explained that his "really deformed limbs" would "require a substantial amount of surgery which will essentially involve fracturing all of the long bones and then resetting them in order to straighten them out."

Valositti, age 5, displayed similar, though somewhat less extreme, symptoms of vitamin D deficiency. Dr. Pantell found that he had "multiple dental caries, . . . very, very foul smelling breath at the time, obvious leg bowing and an abnormal gait." His X-rays were interpreted as manifesting "long bone abnormalities consistent with rickets."

Among the younger siblings, four children presented a more normal appearance, although medical examination disclosed moderate symptoms of rickets. Lemurian, age 3, was in remarkably better condition than siblings in her age range, but she possessed poor dentition and bowed femurs. X-rays of her bone structure showed "diffuse demineralization" and "growth disturbance lines," indicating periods of severe malnutrition in the past. Kaia, age 3, was normal in weight and height, but displayed "foul smelling breath," swelling of rib joints, and "long bone abnormalities consistent with rickets." Kasha, age 8, was a pale, quiet child, in the lower 25 percentile of weight

and height. Dr. Pantell saw no abnormalities in her physical examination, but her blood analysis showed "the chemical abnormalities" of rickets and her X-rays revealed "demineralization of . . . the bones in the upper arms [and] growth disturbance lines in her left arm and in both of her legs." Iternity, age 11, suffered from a curvature of the spine, apparent from a side view, which was characteristic of rickets. Her X-rays did not reveal other bone abnormalities found in her younger siblings, but blood tests disclosed markedly decreased vitamin D levels.

The diagnosis of Jaronimo, age 12, fell into a similar physical pattern as his younger siblings. He suffered from a slight curvature of the spine, some bowing of the thighs, and a blood analysis revealing markedly decreased vitamin D. The medical examination of Nyala, age 16, did not reveal actual bone abnormalities but a blood analysis disclosed decreased vitamin D as well as deficiencies in zinc and vitamin E. Dr. Pantell found no abnormalities in his physical examination of Rashida, age 15, and was unable to evaluate her nutritional condition because the laboratory failed to provide him with the results of blood testing.

The fact that all of the children, with the possible exception of Rashida, suffered from varying degrees of rickets indicated that they lived in an environment shielded from sunlight. Both the pathologist, Dr. Reiber, and the pediatrician, Dr. Pantell, explained the relationship between exposure to the sun and vitamin D deficiency. Normal UV radiation converts molecules in the skin to a precursor of vitamin D which is activated by the liver. No more than 20 to 30 minutes of daily exposure to the sun, on the face alone, is sufficient to prevent rickets even if a person consumes a vegetarian diet deficient in vitamin D. In seeking case histories, Dr. Pantell found that one of the younger children, Iternity, proved to be a good source of information and gave an account of family life that confirmed this medical inference of extreme isolation from sunlight. Later interviews with the three older children corroborated her account.

Iternity told Dr. Pantell that the children lived in the house with their father and four women. Three of the women left daily for work and the fourth stayed at home as their teacher. They ate three meals a day consisting of bread, grains, and vegetables and

watched TV and videos. When Dr. Pantell asked about other daily activities, she said "they basically stayed in the house. Occasionally they might get outside in the yard." She acknowledged playing basketball in the yard. She said she had only had one friend in her life—a boy she played with for a few months before he moved away. She had never gone to school or been to a doctor. She had traveled a couple times and could recall going once to San Geronimo. With these exceptions, the children "stayed indoors and had absolutely no friends whatsoever."

The children gave consistent accounts to law enforcement officers of a harsh and unusual regimen of discipline enforced chiefly by the three oldest children. The adults routinely instructed Nyala, Rashida or Jaronimo to place tape over the mouths of younger children when they cried or made noise. The children also sometimes had their hands or legs tied up with tape or white twine. According to Jaronimo, the tape would remain on a child's mouth or hands for 15 to 30 minutes. Kasha was once tied up at night inside a playpen, for a week or more. During this time, she was completely immobilized by being tied to the playpen with her feet bound together. Children were also required to fast as a punishment. On one occasion, the adults required Kasha to fast for three days because she stole food. Other punishments included spanking, eating hot peppers, isolation in a playpen, "nuzzling" (keeping the child's nose against a wall for a period no longer than an hour), and the "cold splash" (having a bucket of ice water poured on a child). A commonly administered punishment was to force the children to lie face down on "the board," an exercise board in the family room, while other children took turns striking them with a brown belt in the buttocks area. Iternity explained that each child would be instructed to give 15 blows before giving the next child the same opportunity.

Three of the children spoke of a "book of rules," which apparently consisted of several sheets of instructions on required behavior handwritten by various members of the household. The children were punished for "going past the line," leaving the house, or opening the front door.

When contacted by Dr. Pantell and Doerr, the children were quiet, unsmiling, and uncommunicative. Without exception, they spoke with a subdued affect and kept their

eyes down, avoiding eye contact. The most responsive of the younger children, Iternity, answered questions in "a very calm, even tone" during the initial interview, but, according to Dr. Pantell, he "might have seen one smile in the course of the afternoon." Among the older children, Nyala remained withdrawn and was described by Doerr as appearing "just pretty blank." The children expressed no grief or other emotion when asked about Ndigo's death, but rather stated in a "straight, factual reporting manner" that their father told them that it was time for Ndigo to go. When asked to cooperate in simple matters, such as photography, the children proved to be docile and remarkably compliant, staying still and responding immediately to instructions. Dr. Pantell reported that Rashida and Iternity—the two children who spoke most freely—did not express any discontent with their confinement or any aspirations for an independent life.

Four of the small children, Kaia, Chikung, Starchild and Valositti, suffered from a marked developmental lag in learning speech. Among the older children, Dr. Pantell discovered a dramatic isolation from normal education. When asked what they were doing in science, the teenage children, Nyala and Rashida, replied, "Science? We don't study science." Again, when he inquired about books, they said, "We don't have any books." The most outgoing of the younger children, Iternity, was "incapable of doing simple multiplication" and did not have "any concept of what money was." Doerr reported that, after evaluation for learning disabilities, four of the younger children were referred to local educational services.

DISCUSSION

I. Penal Code Section 654

As a first assignment of error, Wright and Campbell contend that the sentences for separate counts of child endangerment alleged in the amended indictments violated the proscription on multiple punishments for a single act contained in Penal Code section 654. They argue that, after imposing a sentence for the third count of child endangerment pertaining to Ndigo, with an enhancement under Penal Code section 12022.95 for corporal injury resulting in death, the trial court was required by section 654 to stay the sentences on the other counts of child endangerment relating to other children.

The relevant portion of section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose of the protection against multiple punishment in section 654 "is to insure that the defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California* (1960) 55 Cal.2d 11, 20 (*Neal*); *People v. Perez* (1979) 23 Cal.3d 545, 552; *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.)

The language of section 654 incorporates a long and complex history of judicial interpretation. "Although section 654 does not expressly preclude double punishment when an act gives rise to more than one violation of the *same* Penal Code section . . . , it is settled that the basic principle it enunciates precludes double punishment in such cases also." [Emphasis added.] (*Neal, supra,* 55 Cal.2d 11, 18, fn. 1; *People v. Harrison* (1989) 48 Cal.3d 321, 337.) *Neal* enlarges "the literal language of section 654 by including as an 'act or omission' a course of criminal conduct wherein multiple violations are incident to an accused's single criminal objective." (*People v. Beamon* (1973) 8 Cal.3d 625, 638.)

Neal observes that "[f]ew if any crimes . . . are the result of a single physical act. 'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' " (*Neal, supra,* 55 Cal.2d 11, 19.) The decision enunciates the following test: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid*.) The *Neal* defendant was convicted of both arson and two counts of attempted murder after igniting gasoline in a room occupied by two persons. The

court set aside the sentence for arson on the ground that it was committed with the same intent and objective as the attempted murders.

The *Neal* test was reviewed and reaffirmed on the ground of stare decisis in *People v. Latimer* (1993) 5 Cal.4th 1203, 1216. *Latimer* notes, however, that the "[d]ecisions since *Neal* have limited the rule's application" by finding "separate, although sometimes simultaneous, objectives under the facts. (E.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162 [assault of robbery victim had separate intent and objective than the robbery]; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 189-193, 196 [harming of unresisting robbery victim a separate objective from the robbery itself]; *People v. Booth* (1988) 201 Cal.App.3d 1499, 1502 ['dual objectives of rape and theft when entering the victims' residences' supported separate punishment for burglaries and rapes]; *People v. Porter* (1987) 194 Cal.App.3d 34, 37-39 [robbery and kidnapping the same victim for a later, additional, robbery had separate objectives].)" (*Id.* at pp. 1211-1212.)

In *People v. Beamon, supra,* 8 Cal.3d 625, the court relied on its earlier decision, *In re Hayes* (1969) 70 Cal.2d 604, to explain this limiting principle: "In *Hayes* the accused, while driving alone in his automobile, committed violations of both driving while under the influence of intoxicating liquor (Veh. Code, § 23102) and driving with knowledge of a suspended license (Veh. Code, § 14601). A majority of this court held that the act or omission of which section 654 speaks is the criminal act or omission which is a part of the accused's conduct . . . . The majority's approach in *Hayes* produced two simultaneous criminal acts—driving while intoxicated and driving with a suspended license—which shared the common element of the physical act of driving." (*People v. Beamon, supra,* at pp. 638-639, italics omitted.)

The courts have avoided broad characterizations of the defendant's intent and objective, which would unduly expand the scope of *Neal*. Thus, *People v. Gaio* (2000) 81 Cal.App.4th 919 affirmed separate sentences imposed on codefendants for receiving and giving three separate bribes. The court declined to treat the bribes as being made with a "single generalized intent and objective of influencing [codefendant] Gaio to favor [codefendant] Hodgin in official matters . . . ." (*Id.* at p. 935.) Instead, the court found

substantial evidence supporting an implied finding that the defendants' "objectives were not identical, and the jury could have found that each of the bribes was paid and received to achieve one or another of them—not necessarily all (or the same assortment)." (*Ibid.*)

Again, *People v. Perez, supra,* 23 Cal.3d 545 rejected a claim that convictions for forcible rape, sodomy and oral copulation involved an assault with the single "intent and objective . . . to obtain sexual gratification." (*Id.* at p. 552.) Holding that separate sentences could be imposed for the three convictions, the court explained, "Such an intent and objective is much too broad and amorphous to determine the applicability of section 654. . . . To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*Ibid.*; see also *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1157.)

"The question of whether a defendant held multiple criminal objectives presents a question of fact, and an appellate court reviews the trial court's findings on this issue under the substantial evidence test." (*People v. Arndt* (1999) 76 Cal.App.4th 387, 397; *People v. Braz* (1997) 57 Cal.App.4th 1, 10.) Thus, in *People v. Osband* (1996) 13 Cal.4th 622, 730, the court found that, when the trial court imposed separate sentences for rape and robbery, "it implicitly found that the crimes . . . involved more than one objective, a factual determination that must be sustained on appeal if supported by substantial evidence." However, in *People v. Harrison, supra,* 48 Cal.3d 321, 335, the court made clear that "[a]lthough the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law."

The test of a single act or omission enunciated in *Neal* does not apply to crimes of violence against multiple victims. As *Neal* explains, "[t]he purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For

example, a defendant who chooses a means of murder that . . . results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not '. . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual.' " (*Neal, supra,* 55 Cal.2d 11, 20-21.)

Applying this principle to the facts of the case, the *Neal* court upheld the defendant's two consecutive sentences for attempted murder. (See also *People v. Champion* (1995) 9 Cal.4th 879, 934, disapproved on other grounds in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 [affirming consecutive sentences for robberies]; *People v. Miller* (1977) 18 Cal.3d 873, 885 [affirming separate sentences for assault and robbery].)

Relying on this exception to the *Neal* test, *People v. Ramos* (1982) 30 Cal.3d 553, affirmed two convictions of robbery where the defendant took money from a fast food restaurant after assaulting two employees with a firearm. The court held: "We view the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property. Accordingly, if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper." (*Id.* at p. 589.)

In *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, the court applied the same principle to reach a different result by holding that the defendant could be sentenced for only one count of felony drunk driving, which resulted in injury to six people. The court observed that "[a] defendant may properly be convicted of multiple counts for multiple victims of a single criminal act only where the act prohibited by the statute is centrally an 'act of violence against the person.' " (*Id.* at p. 351.) Accordingly, it held: "In contrast to the crimes of murder, manslaughter, administering poison, robbery and sex offenses—all of which are defined in terms of an act of violence against the person—the act prohibited by section 23153 is defined in terms of an act of driving: the driving of a vehicle while

intoxicated . . . . The actus reus of the offense does not include causing bodily injury. . . . [¶] Defendants are not chargeable with a greater *number* of offenses simply because the injuries proximately caused by their single offense are greater." (*Id.* at p. 352.)

Similarly, in *People v. Hall, supra,* 83 Cal.App.4th 1084, the court held that the defendant could be sentenced on only one count of Penal Code section 417, subdivision (c), for brandishing a firearm in the presence of three peace officers. The court noted: "A review of the relevant case law since *Neal* reveals that in each case where a criminal act qualified for the multiple-victim exception, the criminal act—that is, the crime of which defendant was convicted, including any allegations in enhancement—was *defined* by statute to proscribe an act of violence against the person, . . ." (*People v. Hall, supra,* at p. 1089.) The court concluded that "[t]he crime, as defined [by Penal Code section 417, subdivision (c)], is not committed upon the peace officers who are present, but is merely committed in their presence. Only once the brandishing becomes an assault do the observers become victims, and does culpability increase with the number of victims." (*People v. Hall, supra,* at p. 1096.)

In the case at bar, defendants were convicted of a violation of Penal Code section 273a, subdivision (a), which "is an omnibus statute that proscribes essentially four branches of conduct." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) "As relevant here, it provides: 'Any person who, under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.' " (*People v. Valdez* (2002) 27 Cal.4th 778, 783.)

The statute embraces direct infliction of abuse as defined in the second prong and indirect abuse as defined in the other three prongs. (*People v. Valdez, supra,* 27 Cal.4th 778, 789; see also *People v. Smith* (1984) 35 Cal.3d 798, 806 ["the definition broadly

includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect"].) *People v. Sargent, supra,* 19 Cal.4th 1206, 1219-1224, holds that direct abuse, i.e., infliction of unjustifiable physical pain or mental suffering within the meaning of the second prong, requires proof of general criminal intent. Subsequently, *People v. Valdez, supra*, made clear that the other kinds of conduct proscribed by the statute, which involve indirect abuse, require only proof of criminal negligence. The *Valdez* opinion quotes the definition of gross negligence in *People v. Penny* (1955) 44 Cal.2d 861, 879, as consisting of " ' "aggravated, culpable, gross, or reckless . . . conduct [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . ." ' " (*People v. Valdez, supra,* at p. 783.)

In our opinion, direct abuse, i.e., the infliction of unjustifiable physical pain or mental suffering on a child, is clearly defined as a crime of violence against the person of an individual within the meaning of *Neal*. (Cf. *People v. Braz, supra,* 57 Cal.App.4th 1, 10.) Such direct abuse comes within the category of assault crimes that have long been held to be crimes of violence for this purpose. (*People v. Ridley* (1965) 63 Cal.2d 671, 677-678; *People v. Cruz* (1995) 38 Cal.App.4th 427, 434; *People v. Masters* (1987) 195 Cal.App.3d 1124, 1127-1128; *People v. Prater* (1977) 71 Cal.App.3d 695, 699.) In the present case, however, the defendants pled guilty to an indictment alleging conduct described in the last prong of the statute, i.e., a person who "having the care or custody of any child . . . willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . . ."[2] (Pen. Code, § 273a, subd. (a).) The application of the crimes of violence exception to this form of indirect abuse presents distinct issues.

We see no difficulty in classifying crimes defined in terms of criminal negligence as crimes of violence. Vehicular manslaughter with gross negligence has indeed been held to be a crime of violence against the person of an individual lying outside the *Neal*

[2] The indictment also alleged circumstances likely to produce great bodily harm or death within the meaning of the enhancement imposed by Penal Code section 12022.95. We do not consider, however, that this enhancement allegation is material to the application of section 654 to the offense of child endangerment.

test. (*People v. McFarland* (1989) 47 Cal.3d 798, 803.) But the last prong of section 273a, subdivision (a), defines conduct that is factually distinguishable from the assault crimes that provide the closest precedents for application of the crimes of violence exception. Moreover, the purpose of section 654 "to insure that the defendant's punishment will be commensurate with his criminal liability" provides uncertain guidance in applying the crimes of violence exception to this form of indirect abuse. (*Neal, supra,* 55 Cal.2d 11, 20.) Whether or not a defendant's level of culpability for child neglect is proportionate to the number of children within the defendant's custody may vary with the facts of the case. We are reluctant to advance any facile generalization. Therefore, we decline to decide whether, or under what circumstances, the crime of violence exception to *Neal* may apply to indirect abuse proscribed by the last prong of section 273a, subdivision (a).

We choose instead to rely on the evidence of the defendants' intent and objectives in analyzing the application of section 654 to the sentences at issue in this appeal. Though the issue appears to be one of first impression, we consider that the withholding of medical care from a child with obvious and severe symptoms of a chronic disease involves an act defined by a single intent and objective. In terms of criminal negligence, where a child displays conspicuous weaknesses or deformities incompatible with a normal life, a failure to seek medical care displays a departure from ordinary prudence and a proper regard for life with respect to that child alone. The purpose of section 654 to make sentencing commensurate with criminal liability does not require that such an act of criminal negligence be merged with neglect of other children displaying distinct forms of aggravated harm. On the record before us, five of the younger children—Ndigo, Dnagual, Starchild, Chikung, and Sirius—displayed different, though extremely severe and obviously debilitating, symptoms of rickets.

We consider that a separate intent and objective may also be defined by social abuse, preventing a normal process of emotional maturation, which does not extend equally to all children. The abuse of the three older children—Nyala, Rashida, and Jaronimo—presented distinct problems. Though they suffered milder symptoms of

rickets (or, in the case of Rashida, possibly no symptoms), they were enlisted as the enforcers in a harsh and unusual regime of disciple presenting clear hazards to their process of socialization, and, as the oldest children, they suffered to a correspondingly greater degree the effects of social and educational isolation. The two girls, Nyala and Rashida, were in fact teenagers and Jaronimo was approaching his teenage years. Yet, living within the confinement of the home and lacking a meaningful education, they were deprived of an opportunity for a normal process of adjustment to adult life.

On the present record, we hold that the separate sentences for Wright meet the *Neal* test permitting imposition of separate sentences.[3] The neglect of each of the younger children with conspicuous and severely debilitating symptoms of rickets involved a separate, though perhaps simultaneous, intent and objective. (*People v. Latimer, supra,* 5 Cal.4th 1203, 1216.) Similarly, a separate intent and objective can be found in the social and educational isolation of the three older children. In these cases, a broader characterization of intent and objective would clearly frustrate the statutory purpose of imposing a punishment commensurate with criminal liability. (*People v. Perez, supra,* 23 Cal.3d 545, 552; *People v. Gaio, supra,* 81 Cal.App.4th 919, 935.) Hence, we see no error in the separate sentences in counts 3, 6, 7, and 8 for child abuse of Ndigo, Starchild, Chikung, and Sirius or for the separate sentence in count 4 for child abuse of the three oldest children, Nyala, Rashida, and Jaronimo. The fact that the abuse of Dnagual was not separately charged and sentenced represents an act of prosecutorial leniency. The grouping of six other children under count 5 avoids difficulties in satisfying the *Neal* test.

We also see no error in the sentencing of Campbell. The neglect of her deceased child, Ndigo, and grossly deformed child, Chikung, reflects a separate intent and objective for the reasons discussed above in connection with her codefendant, Wright. To conflate these acts of child neglect with others of which she pled guilty would defeat

[3] We reject Wright's argument that "appellant and his co-defendants committed only a single course of conduct, with a single objective—to provide the healthiest and best environment for the family, spiritually, dietarily, and interpersonally."

the statutory purpose of imposing criminal liability corresponding to culpability. We recognize, however, that the separate 16-month sentence for child abuse of Kaia presents a close issue. Like Lemurian, Kaia was not as severely deformed as some other children his age or younger. But the question whether his symptoms supported a finding of a separate intent and objective presents a question of fact, which we must review under the substantial evidence test. (*People v. Osband, supra,* 13 Cal.4th 622, 730; *People v. Harrison, supra,* 48 Cal.3d 321, 335.) The record discloses that he in fact suffered from symptoms of dental and bone abnormalities reflecting a severe condition of vitamin D deprivation. We cannot say that the court's implied finding of separate intent and objective lacks support in the record. Finally, count 4 does not present issues under Penal Code section 654 to the extent that it includes three children in a single charge.

II. Consecutive Sentencing Criteria Used for Wright

Wright next argues that the court abused its discretion in applying the criteria of California Rules of Court, rule 4.425, to impose consecutive sentences.[4] He argues that a crime of child abuse under Penal Code section 273a entails a continuing course of conduct that necessarily involved a single period of aberrant behavior within the meaning of rule 4.425(a)(3).

Rule 4.425 provides: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) Facts relating to the crimes, including whether or not: [¶] . . . [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, . . ."

"It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear

[4] In her opening brief, Campbell joins only in the challenge to the sentence under Penal Code section 654 and does not join in the argument of abuse of discretion under California Rules of Court, rule 4.425(a)(2).

showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

"The decision to impose consecutive sentences is . . . a 'sentence choice' for which, under the determinate sentencing law, the trial court must give reasons." (*People v. Champion, supra,* 9 Cal.4th 879, 934, citing Pen. Code, § 1170, subd. (c).) Nevertheless, the court's failure to state reasons, or its statement of both proper and improper reasons, may be harmless error. (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Champion, supra,* at p. 934.) Thus, in *Champion* the court declined to remand the case for resentencing where the probation report noted numerous circumstances in aggravation even though the trial court failed to give any reasons for imposing consecutive sentences. The court held: "It is inconceivable that the trial court would impose a different sentence if we were to remand for resentencing. Accordingly, we find the trial court's failure to state reasons for imposing consecutive sentences to be harmless." (*People v. Champion, supra,* at p. 934.)

The record discloses that, after finding five factors in aggravation and three in mitigation, the trial court found that the factors in aggravation were decisive and imposed the upper term. Then, proceeding to the issue of consecutive sentences, the court offered the following statement of reasons: "With regard to the subject of concurrent or consecutive sentences, first of all, I do not believe 654 of the Penal Code should be applied here, as there are individual children as to whom individual duties and responsibilities were owed by the defendant. Separate impacts on each of those victims and each of the counts represent at least one separate victim. And therefore, in my view, under rule [4.425(a)(3)], as these events as to each child do not represent a single period of aberrant behavior, that consecutive sentences are warranted."

We cannot agree with Wright's assumption that a continuing course of conduct necessarily involves "a single period of aberrant behavior" within the meaning of rule 4.425(a)(3). The record does not reveal details as to how the bizarre household regimen evolved, but we know that the family had moved several times within San Francisco and

later to San Rafael, Jaronimo displayed symptoms of rickets at age 12, the children most recently born into the household all displayed very severe symptoms of rickets, and only one child had ever been taken to a doctor and then only for a single visit. In short, the record establishes a lengthy history of neglect involving different victims under varying circumstances. Although rule 4.425(a)(3) cannot easily be applied to these facts, we consider that the abuse falls more easily within the category of crimes "committed at different times or separate places" than within the category of "a single period of aberrant behavior."

Though the court expressly mentioned only rule 4.425(a)(3), we construe its references to "separate impacts" and "events as to each child" as also invoking rule 4.425(a)(2) in the context of its statement. We have declined to apply the act of violence exception to the *Neal* test for application of Penal Code section 654, but we regard rule 4.425(a)(2) as imposing a more limited test. In view of the severe physical harm to five of the younger children, we consider that the trial court could find that the crimes involved "separate acts of violence" within the meaning of this criteria. In addition, the court's findings of circumstances in aggravation for the purpose of imposing the upper term also serve to support the decision to impose consecutive sentences under rule 4.425.

Finally, even if we were to find error in the trial court's statement of reasons under rule 4.425(a)(3), we would not have grounds to remand the case for resentencing. The trial court properly concluded circumstances in aggravation justified an upper term and imposed a sentence that displays leniency rather than severity. The district attorney not only dismissed the murder, manslaughter, and weapons charges, but chose not to separately charge child abuse of Dnagual, one of two most severely affected surviving children. Under these circumstances we see no reasonable probability that the trial court would choose a lesser sentence if we were to conclude that one of its reasons for imposing consecutive sentences was improper.

III. The No-contact Order

Finally, Wright challenges a no-contact order issued at the sentencing hearing. The trial court included the following order in the sentence delivered from the bench:

"The defendant is also ordered not to have any contact with the co-defendants in this case either telephonically, personally, or in writing, or through the use of a third party. Also the defendant is ordered not to have any visitation or contact through telephonic means or in writing through a third party with the minor victims involved in this case without specific approval from Child Protective Services and/or a court order." The order was also stated in abbreviated form in the abstract of judgment.[5]

At the sentencing hearing, defense counsel raised a very limited objection to the reference to Child Protective Services. She asserted that there is a "group called The Consortium" that acts as the mediator for visitations and hence "it's not necessarily something that's blanketed through CPS." She also pointed out that some of the older children would not remain under the supervision of CPS much longer. The court offered to consider a letter brief on this issue but ruled that it would otherwise let the order stand as it was stated. The record does not disclose any further briefing on the issue.

Wright now argues that the order lacked statutory authorization. He acknowledges that a no-contact order may be included as a condition of probation under Penal Code section 1203.1, subdivision (i)(2) or (j), or may be issued during the pendency of trial under Penal Code section 136.2, subdivision (d), but he contends that there is no authority for including such an order in the sentence itself. The People construe Penal Code section 136.2 more broadly. They argue that the statute is not expressly limited to pre-judgment orders and provides authority for a no-contact order effective after imposition of the judgment.[6]

We regard Penal Code section 136.2 as being ambiguous on this point, though policy reasons may favor a broad interpretation. However, we need not resolve the issue

[5] Under the heading, "other orders" the abstract of judgment states: "No contact with co-defendants in this case in any manner. No visitation or contact in any manner with minor victims unless specifically approved by Child Protective Services."

[6] Penal Code section 136.2, subdivision (d), provides: "Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following: . . . (d) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose."

of statutory interpretation in this appeal. We consider that, even if the trial court erred in assuming statutory authority for the order, the error would not involve the sort of "clear and correctable legal error" that would qualify as an unauthorized sentence subject to correction on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 236; *In re Ricky H.* (1981) 30 Cal.3d 176, 190-191; *People v. Davis* (1981) 29 Cal.3d 814, 827 & fn. 5.) Instead, we consider that the issue of statutory construction regarding the proper scope of section 136.2 falls within the general rule that "only those claims [of error in sentencing] properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The record here discloses that defense counsel failed to object in principle to the no-contact order and questioned only the reference to Child Protective Services. This limited objection did not suffice to preserve the issue of statutory interpretation on appeal.

IV. Denial of Probation

Campbell contends that the trial court abused its discretion in denying her request to be placed on probation. We begin with the familiar principles that "[a] trial court has broad discretion in determining whether or not to grant probation. In reviewing that determination it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances." (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 825; see also *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978; *People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

At the outset of the sentencing hearing on April 4, 2003, the trial court enumerated the documents it had reviewed, including the probation officer's presentence report, Campbell's statement in mitigation, the people's sentencing statement, and a 22-page letter of Abraham Nievod, a licensed clinical psychologist, based on approximately 70 hours of interviews. Patricia Alba of Marin Abused Women's Services spoke in favor of the grant of probation, and Campbell addressed the court personally, accepting

responsibility and expressing remorse and a determination to work with a therapist and rehabilitative programs.

The trial court next reviewed the criteria affecting probation in California Rules of Court, rule 4.414. The court found a series of facts relating to the defendant that clearly weighed in favor of a grant of probation: the absence of a prior record, willingness to comply with the terms and conditions, ability to comply with terms of probation, and "heartfelt remorse." (Rule 4.414(b)(1), (3), (4) & (7).) Nevertheless, it found facts that militated against probation coming within the categories of rule 4.414(a)(1), (3), (4), (6) and (9).

First, applying the criteria of rule 4.414(a)(1), the court considered that "the circumstances of these crimes are more significant than a typical count or case of child endangerment . . . these offenses involved a repetition over a period of time of the same conduct. It was a continuous neglect of the children to the point of suffering and cruelty." Second, addressing the victims' vulnerability under rule 4.414(a)(3), it found that "the younger children could be seen as being especially vulnerable." Moreover, "the children were made more vulnerable . . . because there was a pattern of isolating them from the world, and . . . they were completely dependent upon and subject to the fiat and whims of their caretakers." Third, with respect to the infliction of physical and emotional injury under rule 4.414(a)(4), the court observed that "there's little question that these children have suffered significant emotional injury as well as the observable physical injuries that have been described in the record." Fourth, the court acknowledged that the issue of whether the defendant was an active participant within the meaning of rule 4.414(a)(6) was subject to different interpretations. Nevertheless, it concluded that the biological mother "has such a responsibility that one must say she was an active participant in the neglect of them, that is her duty was so clear . . . to . . . nurture, nourish and protect these small people, that one can only say she was an active participant." Fifth, with regard to whether the defendant took advantage of a position of trust or confidence within the meaning of rule 4.414(a)(9), the court reasoned that "she was the

mother of these children. She owed them everything she could do, her complete devotion and dedication and care."

On balance, while acknowledging that "reasonable minds could differ," the court concluded that probation was not appropriate because the factors unfavorable to probation were more significant than those that were favorable. The ruling unquestionably finds support in the record. The court's weighing of favorable and unfavorable factors cannot be said to exceed the bounds of reason. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Nevertheless, Campbell argues that the trial court abused its discretion because it failed to address her condition as a battered woman and her subservient and passive role in the household and failed to consider the psychological evaluation and recommendations for treatment and therapy of Dr. Nievod and the treatment recommendations of the representative from Marin Abused Women's Services. The court, however, is presumed to have properly evaluated matters properly before it. (*People v. Parrott* (1986) 179 Cal.App.3d 1119, 1125.) Rule 4.409 states: "Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise." We find nothing in the record affirmatively indicating that the court failed to consider the arguments for probation advanced by Marin Abused Women's Services or Dr. Nievod's evaluation describing her subservient role in the household and recommending continued therapy and treatment.

V. Denial of the Request to Strike the Enhancement

Campbell argues that the trial court abused its discretion in declining to strike the four-year enhancement under Penal Code section 12022.95 for circumstances likely to cause great bodily harm or death. She requested that the court strike the four-year term in her statement in mitigation. At the sentencing hearing, the court heard arguments on the issue and denied the request: "With regard to the enhancement under 12022.95 of the Penal Code as to Count 3 regarding Ndigo, the question posed to the Court essentially is whether or not there is sufficient mitigation in this case to warrant the striking of that

mandatory consecutive term of four years. I have considered that. As I said above previously that there is mitigation, I don't believe the mitigation is such that [the] enhancement or the four-year sentence that it provides should be stricken, and so I will not do that."

The court's decision to strike, or refrain from striking, an additional prison term for an enhancement under Penal Code section 1385 and California Rules of Court, rule 4.428(a), is reviewed on appeal for an abuse of discretion. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530.) "Where . . . a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan, supra,* 42 Cal.3d 308, 316.)

In the present case, Campbell presents two arguments for striking the enhancement. First, she points out that Penal Code section 273a punishes both direct infliction of harm by intentional conduct and indirect infliction of harm by criminal negligence as charged in her case. The latter conduct, she argues, may involve a lower level of criminal liability. Hence, the enhancement to section 273a imposed by Penal Code section 12022.95 may be more easily challenged in the case of convictions for indirect harm. Second, she relies on Dr. Nievod's psychological evaluation, which found that Campbell had effectively ceded to Wright and the other wives "the power to make decisions that affected . . . the health of her children." Dr. Nievod explained, "Therefore, not seeking medical attention sooner for Ndigo was in keeping with Mr. Wright's systematic isolation of this family. Reliance on outside expertise, whether medical or other, was regarded by Mr. Wright as a threat to his power and control. He dealt with all such threats in a similar manner—he refused to accede to any needs, whether from his wives or because of the children."

We find, however, that the trial court's decision is supported by the aggravated nature of the offense. The deceased child, Ndigo, was grotesquely underdeveloped and deformed by the effects of rickets and suffered from multiple fractures of his fragile

bones. Campbell told Dr. Nievod that she became concerned about his condition in the weeks before his death because the child seemed to "be in more pain and more pain as she attempted to move him." She asked Wright for permission to take the child to a physician on three occasions but took no action when Wright refused to consent to medical treatment. Even when the child stopped breathing, she waited for Wright's permission to take the body to the hospital.

Under these facts, we cannot say that the trial court exercised its discretion in an arbitrary and capricious manner when it found that the mitigating circumstances were not sufficient to justify striking the four-year sentence imposed by Penal Code section 12022.95.

VI. Blakely Error

In a supplemental brief, Wright maintains that under the recent decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely)* the trial court violated his Sixth Amendment rights by imposing upper and consecutive terms that were not based upon either his admissions or a finding made by a jury beyond a reasonable doubt. He construes the *Blakely* decision as holding that a sentence based on middle and concurrent terms of imprisonment represents the statutory maximum sentence, which cannot be exceeded, in the absence of the defendant's admission, without a finding by a trier of fact and proof beyond a reasonable doubt of the existence of aggravating factors. This contention calls for a careful examination of the *Blakely* opinion and the application of the determinate sentencing law to the present case.

A. The Blakely Opinion.

In *Blakely*, the United States Supreme Court revisited the rule enunciated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and later applied in *Ring v. Arizona* (2002) 536 U.S. 584 that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 124 S.Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure followed by courts in the State of Washington deprived the petitioner of his

"federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Ibid*.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id*. at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping carried a maximum statutory sentence of 10 years. (*Blakely*, *supra*, at p. 2535.) The Washington sentencing guidelines, however, limited sentencing to a "standard range" of 49-53 months and authorized the judge to impose a sentence above this range (but below the 10-year maximum) upon a finding by a preponderance of the evidence of enumerated grounds " 'justifying an exceptional sentence.' " (*Ibid.,* citing Wash. Rev. Code § 9.94A.120(2).) At the sentencing hearing, the court imposed an "exceptional sentence" of 90 months, based on a finding that the petitioner used "deliberate cruelty" in the commission of the offense, one of the grounds for departure from the standard sentencing range. (*Blakely*, *supra*, at p. 2535.)

The *Blakely* court viewed *Apprendi* as reflecting "a fundamental reservation of power in our constitutional structure." (*Blakely, supra*, 124 S.Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (*Blakely, supra*, at p. 2540.) The court stated that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." (*Blakely, supra*, at p. 2539.)

Blakely confirmed the premise of *Apprendi* that a defendant's constitutional rights have been violated when a judge imposes "a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, [ ]; *Ring, supra*, at 603-609, [ ]." (*Blakely, supra*, 124 S.Ct. 2531, 2537; see also *United States v. Croxford* (D.Utah, 2004) 324 F.Supp.2d 1230, 1235-1236.) The court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional

facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra*, at p. 2537; see also *United States v. Ameline* (9th Cir. 2004) 376 F.3d 967, 975.)

Reversing the additional sentence based on a finding of "deliberate cruelty," the court reasoned: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4)." (*Blakely, supra*, 124 S.Ct. 2531, 2537-2538, fn. omitted.)

In a very recent successor case to *Blakely*, the United States Supreme Court once again confirmed the *Apprendi* rule that, "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker* (2005) 543 U.S. ____, 05 C.D.O.S. 315, 319, (*Booker*).)[7] Finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely*, (*Booker, supra,* at p. 317) the court concluded that its "holding in *Blakely* applies to the Sentencing Guidelines." (*Booker, supra,* at p. 319.) The court observed that although the Federal Sentencing Guidelines are listed in title 18 United States Code, section 3553(a) "as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the

[7] The *Booker* opinion was decided after the briefs were filed in the present case, but is binding upon any case, such as this one, still pending on appeal.

range' established by the Guidelines, subject to departures in specific, limited cases." (*Booker, supra,* at p. 317.) Thus, in "most cases" the Guidelines furnish "all relevant factors" to be taken into account, without departures permissible, and "the judge is bound to impose a sentence within the Guidelines range." (*Booker, supra,* at p. 317.) The court pointed out, however: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the *Sixth Amendment*. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." (*Booker, supra,* at p. 317.) As written, however, the Guidelines were found "mandatory and binding on all judges," and to that extent constitutionally invalid. (*Booker, supra,* at p. 317.)

In a separate companion opinion the court turned to the "second question presented, a question that concerns the remedy." (*United States v. Booker, supra*, 543 U.S. ____, slip opn. at p. 2.) Rather than declaring "total invalidation" (*id.* at p. 6) of the Federal Sentencing Guidelines or engrafting onto them the " 'jury trial' requirement" (*id.* at p. 3) articulated in *Blakely* and *Booker*, by "looking to legislative intent" (*id.* at p. 2) the court decided that "Congress would have preferred" (*id.* at p. 6) the remedy of partial invalidation, severance, and excision of two provisions of the statutory scheme to "make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing Congress intended its Guidelines system to achieve." (*United States v. Booker, supra*, slip opn. at p. 3.)

The "two specific statutory provisions" the court severed and excised are: "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see [title 18 United States Code, section] 3553(b)(1) (Supp. 2004), and the provision that sets forth standards for review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e) (main ed. and Supp. 2004) [citation]. With these two sections excised (and statutory cross-references to the two sections

consequently invalidated), the remainder of the [Sentencing Reform Act of 1984] satisfies the Court's constitutional requirements." (*United States v. Booker, supra*, 543 U.S. ____, slip opn. at p. 16.) Without the provision "that makes 'the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges,' " the court found that the statute "falls outside the scope of *Apprendi's* requirement." (*United States v. Booker, supra*, slip opn. at p. 16.) Under the court's remedial ruling, section 3553(a) of the Act, which "sets forth numerous factors that guide sentencing" and review by appellate courts, "remains in effect." (*United States v. Booker, supra*, slip opn. at p. 19.) Finally, the court declared that, "the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent" to " 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities [and] maintaining sufficient flexibility to permit individualized sentences when warranted.' [Citations.]" (*United States v. Booker, supra*, slip opn. at p. 21.)

B. Waiver of Blakely Error

The Attorney General argues that unlike the defendant in *Blakely*, Wright did not object to the sentence that was imposed and therefore forfeited any claim of error on appeal. It is true that "[c]laims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court. [Citation.]" (*People v. Brach* (2002) 95 Cal.App.4th 571, 577, italics omitted; see also *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305.) Our high court has observed that even constitutional rights can be waived. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.)

However, "[c]laims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

Defendant has presented a claim of deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) This constitutional challenge is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) If his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People v. Sexton* (1995) 33 Cal.App.4th 64, 69.)

Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of well-established law that consistently denied a criminal defendant the constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (See *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People v. Ramos* (1980) 106 Cal.App.3d 591, 605-606; *People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-411; *People v. Nelson* (1978) 85 Cal.App.3d 99, 102-103; *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500.) We therefore conclude that defendant has not waived his right to complain of *Blakely* error, and elect to address his constitutional claims on their merits. (*People v. Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; see also *People v. Marshall* (1996) 13 Cal.4th 799, 831-832; *People v. Ashmus* (1991) 54 Cal.3d 932, 976; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

C. The Imposition of an Upper Term Under the Determinate Sentencing Law

Under the California determinate sentencing law (California DSL), "The statutory basis for the selection of punishment for offenses or enhancements which contain three potential terms is section 1170, subdivision (b) which states in pertinent part: 'When a judgment of imprisonment is to be imposed and the statute specifies three possible terms,

the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.' " (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1045, italics added.) California Rules of Court, rules 4.421 and 4.423, respectively, articulate the "circumstances in aggravation and mitigation of an offense. (Judicial Council of Cal., Annual Rep. (1978) p. 3.) [¶] 'Facts relating to the crime' are set forth in subdivision (a), and 'facts relating to the defendant' in subdivision (b), of each rule." (*People v. Cheatham* (1979) 23 Cal.3d 829, 832-833.) Under rule 4.420(b), "The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence." (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

"A trial court weighs aggravating and mitigating factors when it faces the discretionary decision of which of three possible terms to impose under the determinate sentencing law." (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250.) " 'Selection of the upper term is justified only if, considering the *entire record* of the case, including the probation officer's report, other reports properly filed in the case and other competent evidence, circumstances in aggravation are established by a preponderance of the evidence and outweigh circumstances in mitigation.' [Italics added.] (Cal. Rules of Court, [former] rule 439(b).)." (*People v. Laws* (1981) 120 Cal.App.3d 1022, 1037.) "[S]ection 1170, subdivision (b), as implemented by rule [4.420], leaves to the lower court a choice to be made in the exercise of its discretion as to whether, even after weighing the aggravating circumstances against the mitigating circumstances and determining the aggravating circumstances preponderate, it will impose the upper or middle term as the base term. The statute does not mandate a selection by the court of either of those terms under any particular circumstances, but mandates only selection of

the middle term in the absence of aggravating or mitigating circumstances." (*People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

While the consideration of sentencing factors and discretionary selection of an appropriate punishment are traditional sentencing functions, the specification of a mandatory or presumptive middle term brings the California DSL into conflict with *Blakely* and invalidates the imposition of an upper term upon defendant. Under section 1170, subdivision (b), three possible terms of imprisonment for each offense are specified, but the sentencing court may not impose the upper term without a finding by a preponderance of the evidence—rather than beyond a reasonable doubt—that circumstances in aggravation outweigh circumstances in mitigation. (*People v. Wright* (1982) 30 Cal.3d 705, 709-710.) "In determining which term to impose, 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' (Pen. Code, § 1170, subd. (b).)" (*People v. Wright, supra,* at p. 709.) "[A] special finding of aggravation must be made before the upper term for an offense can be imposed . . . ." (*In re Manzy W*. (1997) 14 Cal.4th 1199, 1202, fn. 1.) " ' "[T]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption." ' " (*People v. Edwards* (1993) 13 Cal.App.4th 75, 79, quoting from *People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Thus, the maximum penalty the court has authority to impose under the California DSL without finding additional facts is the middle term. To select an upper term the sentencing court does not merely consider sentencing factors before exercising discretion, as occurs with the choice of a consecutive or concurrent term, but rather must find circumstances in aggravation that outweigh circumstances in mitigation. (*People v. Wright, supra,* 30 Cal.3d 705, 709-710.) Under the California DSL a sentencing judge cannot make the discretionary decision to increase a sentence above the middle term without first finding "facts to support it beyond the bare elements of the offense;" the

verdict or plea alone does not authorize the sentence. (*Blakely, supra*, 124 S.Ct. 2531, 2538, fn. 8.)

In the present case, the trial court based the upper term sentencing on findings that aggravated circumstances under California Rules of Court, rule 4.421 outweighed mitigating circumstances under rule 4.423. More specifically, the court found that the offense involved the aggravating circumstances of "a high degree of cruelty," a particularly vulnerable victim, a position of dominance over other participants in the offense, the inducement of minors to assist in the commission of the offense, and the use of planning in the commission of the offense. (Rule 4.421(a)(1), (3), (4), (5), & (8).) These factors, the court found, outweighed the mitigating circumstances of an insignificant record of criminal conduct, the existence of a mental condition that reduced culpability for the crime, and an early admission of guilt. (Rule 4.423(b)(1), (2), & (3).) Since the aggravating circumstances involved the current offense, the sentencing does not come within the exception in *Apprendi* for enhanced penalties based on a defendant's prior convictions or other recidivist conduct. (*Apprendi, supra,* 530 U.S. 466, 490; *People v. Epps* (2001) 25 Cal.4th 19, 25; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Taylor* (2004) 118 Cal.App.4th 11, 28.) Under the mandates of *Blakely* we are required to conclude that the imposition of the upper term on the basis of judicial findings by a preponderance of the evidence entails constitutional error under *Blakely.*

D. The Imposition of Consecutive Sentences

We consider, however, that the trial court's exercise of sentencing discretion to select consecutive subordinate terms of imprisonment did not violate *Blakely*. A concurrent term is not a specified presumptive or standard maximum sentence. Section 669 provides that when a defendant "is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts," the sentencing court "shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (See also *People v. Downey* (2000) 82 Cal.App.4th 899, 912-913.)

Section 669 thus imposes a mandatory duty upon the trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively, but the choice of a consecutive or concurrent term is entirely discretionary with the trial court based upon consideration of the sentencing criteria set forth as guidelines in rule 4.425. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256; *In re Calhoun* (1976) 17 Cal.3d 75, 80-81; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458; *People v. Coelho* (2001) 89 Cal.App.4th 861, 886; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 194; *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350.) "[T]he provisions of rule [4.425] are merely '[c]riteria affecting the decision to impose consecutive rather than concurrent sentences . . . .' They are guidelines, not rigid rules courts are bound to apply in every case . . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense (§ 1170, subd. (b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. (§§ 669, 1170.1, subd. (a); rule [4.]433(c)(3).)" (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Therefore, a consecutive term does not represent a departure from any standard or presumptive sentencing range. Either a consecutive or concurrent term is within the trial court's discretion and the permissible statutory range of punishment if the defendant has been found guilty of multiple crimes by the jury. Nor is the sentencing court required to make an additional finding of fact as a prerequisite to imposing the more severe punishment of a consecutive sentence. The jury verdict, not any additional necessary finding of fact by the trial court, justifies the imposition of a consecutive term. (*People v. Shaw, supra*, 122 Cal.App.4th 453, 459.)

We conclude that a consecutive term imposed under California law is a discretionary sentence choice that does not increase the penalty beyond the prescribed statutory maximum and is not tantamount to an *Apprendi* enhancement or a *Blakely*

exceptional sentence. (*People v. McPherson* (2001) 86 Cal.App.4th 527, 532; *People v. Farr* (1997) 54 Cal.App.4th 835, 843.) Therefore, Wright was not denied his due process rights to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely* by the trial court's selection of consecutive subordinate terms. (*People v. Shaw, supra*, 122 Cal.App.4th 453, 459.)

E. Prejudice

We turn finally to the issue of whether the imposition of an upper term in violation of *Blakely* was prejudicial to Wright. We conclude that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (See *People v. Epps, supra,* 25 Cal.4th 19, 29; *People v. Vera* (1997) 15 Cal.4th 269, 278; *People v. Marshall, supra,* 13 Cal.4th 799, 851-852.) Rather, we follow the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the judgment. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

The explication in *Booker* of the constitutional flaws in the Federal Sentencing Guidelines and the appropriate remedy to be enforced not only assists in our determination of the nature and scope of the error committed in the imposition of an upper term under the California DSL, but also significantly impacts our prejudicial error analysis in the present case.[8] Although the Federal Guidelines differ greatly in structure from the California DSL, the constitutional invalidity of both sentencing schemes is based upon the "mandatory nature" of the sentencing decisions required to exceed a stated maximum term. (*Booker, supra*, 05 C.D.O.S. 315, 317.) Section 3553(b) of the Guidelines requires sentencing courts to impose a "base" sentence at a level within the stated Guidelines range, then mandates an increase in the term if facts are found by the

[8] The court in *Booker* indicated: "[W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review." (*United States v. Booker, supra*, 543 U.S. ____, slip opn. at p. 25.)

court "beyond those found by the jury." (*Booker, supra,* at p. 317.) Section 1170, subdivision (b), provides that the court "*shall* order imposition" of a particular sentence, the middle term, unless findings of circumstances in aggravation or mitigation of the crime by the court justify divergence to a greater or lesser punishment. (Italics added; see also *People v. Brown, supra,* 83 Cal.App.4th 1037, 1045.)

We think the appropriate remedy for the California DSL, upon consideration of the legislative intent upon which the sentencing scheme is predicated, is the same one the United States Supreme Court devised in *Booker* for the Federal Guidelines. We perceive in the California DSL the identical objectives and policy considerations that underlie the Federal Guidelines: to promote increased uniformity and diminish disparity in sentencing, while maintaining sufficient flexibility to permit individualized sentences imposed by the trial court with specified discretion that are proportionate to the seriousness of the offense based upon "real conduct." (*United States v. Booker, supra*, 543 U.S. ____, slip opn. at pp. 7, 10, 21; see also § 1170, subd. 18 (a);[9] *People v. Martin* (1986) 42 Cal.3d 437, 442-443; *In re Jeanice D*. (1980) 28 Cal.3d 210, 224; *In re Morrall* (2002) 102 Cal.App.4th 280, 288; *People v. West* (1999) 70 Cal.App.4th 248, 255-257.)

Without the "mandatory" middle term provision in section 1170, subdivision (b), the California DSL, again like the Federal Guidelines, remains faithful to the legislative intent to avoid sentencing disparities and promote certainty, while maintaining flexibility to permit imposition of individualized punishment appropriate to the crime and the offender. (*United States v. Booker, supra*, 543 U.S. ____, slip opn. at p. 21.) Even if the initial instruction to the trial court to impose the middle term is deleted, the sentencing scheme retains the elements of uniformity and proportionality with the discretionary

[9] Section 1170, subdivision (a)(1), reads: The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion."

selection of one of three potential terms within the legislatively established range. A sentence choice must still be based upon consideration of specified aggravating and mitigating circumstances, rather than determined according to the caprice of the court.

We are also convinced that, as with elimination of section 3553(b) from the Federal Guidelines, the remainder of the California DSL properly functions independently of the directive in section 1170, subdivision (b), to impose the middle term unless additional predicate findings are made by the trial court. The sentencing court may continue to consider relevant aggravating and mitigating circumstances, make factual determinations, and exercise discretion to choose a specific lower, middle or upper term. We therefore conclude, in accordance with the opinion in *Booker*, that rather than invalidate the California DSL in its entirety or engraft onto it jury trial requirements, the legislative intent would best be served by severing and excising the mandatory middle term provision in section 1170, subdivision (b). (*United States v. Booker, supra*, 543 U.S. ____, slip opn. at p. 2.)[10]

With the deletion of the presumptive middle term the California DSL does not otherwise contravene the Sixth Amendment as defined in *Blakely*. Absent the specification of a middle term as the statutory maximum, and the command to impose that term absent findings of facts beyond those made by the jury, the sentencing court merely selects one of three specified terms that are all within the prescribed range, and none of which exceed the statutory maximum. The Sixth Amendment is not implicated by advisory provisions that recommend rather than require selection of particular sentences in response to differing sets of facts. (*United States v. Booker, supra,* 543 U.S. ____, 05 C.D.O.S. 315, 317.) Discretionary selection of a lower, middle or upper term based upon consideration of appropriate mitigating or aggravating circumstances conforms to the precepts of *Blakely* "For when a trial judge exercises his discretion to

[10] We do not, in the present case, need to implement that remedy, nor do we do so. We only state our conclusion that under *Booker* the appropriate remedy appears to be severance and deletion of the mandatory middle term provision. We leave the final determination of the judicial remedy, if any, for the constitutional defects in California DSL to another case or to our high court.

select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (*United States v. Booker, supra,* 543 U.S. ___, 05 C.D.O.S. 315, 317.) As we read *Booker*, the only constitutional defect in the California DSL is that a binding middle term is set as the statutory maximum, which may be exceeded only upon additional findings made by the trial court.

If the only constitutional defect in the sentencing scheme is the mandatory middle term provision, and the only remedy necessary to cure the defect is elimination of the offending provision, the only error comitted by the trial court in the present case was adhering to the statutory dictate to exceed the statutory maximum middle term only upon findings of fact not made by the jury. Rather than considering the relevant factors and exercising discretion to select an appropriate term within the defined range, as endorsed in *Booker*, the court erred by making the findings necessary to exceed the middle term, as commanded by section 1170, subdivision (b). Consequently, the focus of our prejudicial error analysis is upon whether the trial court would have selected a lesser sentence if it had exercised discretion to choose any of the three terms within the authorized sentencing range unfettered by the threshold directive to impose the middle term. (See *In re Manzy W., supra,* 14 Cal.4th 1199, 1209-1210; *People v. Price, supra,* 1 Cal.4th 324, 492; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1435.) To find the federal constitutional error harmless we must be able to conclude that "beyond a reasonable doubt" the error in following the mandatory middle term provision of the statute did not contribute to the result of an upper term sentence. (See *Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Simon* (1995) 9 Cal.4th 493, 506, fn. 11, *People v. Spark* (2004) 121 Cal.App.4th 259, 269; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1686-1687.)

We conclude that the trial court would certainly have imposed the upper term upon Wright if granted discretion to choose one of the three specified sentences upon consideration of relevant sentencing factors. The egregious facts of the case and the multitude of aggravating circumstances that are established by essentially undisputed evidence provide abundant justification for an upper term sentence, which we are

convinced the trial court would have selected if not bound by the middle term and required to find aggravating facts beyond those found by the jury. The sentencing error committed by the trial court was not prejudicial to Wright.

DISPOSITION

In the case of Campbell, we note a clerical error in the abstract of judgment. The trial court imposed a sentence of 10 years consisting of a lower term of 2 years for felony child abuse, an enhancement of 4 years for circumstances likely to produce great bodily injury or death, and three consecutive terms of 16 months reflecting one third of the middle term for felony child abuse on counts four, five and six. The abstract of judgment properly states that the total time is 10 years and correctly identifies the 2-year principal term and 4-year enhancement but erroneously refers to three consecutive terms of 8 months on counts four, five, and six.

The judgment of Campbell is remanded for the limited purpose of correcting the clerical error in the abstract of judgment so as to provide for three consecutive terms of 16 months on counts four, five, and six, and is otherwise affirmed.

In all other respects, the judgments are affirmed.

_____

Swager, J.

We concur:

_____

Marchiano, P. J.

_____

Margulies, J.